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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1302

THOMAS H. FITZGERALD,
Petitioner,

v.

MARTIN P. CATHERWOOD, as Industrial Commissioner of the State of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Now comes Thomas H. Fitzgerald, Petitioner, and respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case the 2nd day of January, 1968.

Citation of Opinions Below

The opinion of the District Court (R 141), printed as Appendix B hereto is not officially reported; 55 CCH Labor cases ¶ 51,632.

The opinion of the Court of Appeals for the Second Circuit (R 158), printed in Appendix A hereto is not yet officially reported; 57 CCH Labor cases ¶ 51,808.

Jurisdiction

The judgment sought to be reviewed is that of the Court of Appeals for the Second Circuit dated January 2nd, 1968 and entered on January 2nd, 1968 (R 172). No rehearing was sought.

By order of Mr. Justice Harlan dated March 21, 1968 the time of petitioner to file petition for writ of certiorari was extended to and including April 16, 1968.

Jurisdiction of this Court is invoked under 28 USC Section 1254(1).

The attention of the Court is called to a special jurisdictional problem presented by the record arising out of the three-judge district court issue. 28 USC 2281. This problem is discussed *post*, page 24.

Questions Presented

1. Where a labor union in commerce has elected as its President a member in good standing who is, and is known to the union's electorate to be also President and sole stockholder of a corporation which is an employer of some of the union's members and a federal statute 29 USC 481(e) provides that every member of a union in good standing shall be eligible to hold union office, is a New York statute, Labor Law, Sec. 723, prohibiting a labor union official from having any financial interest in an employer inoperative as preempted under the Supremacy clause of the Constitution.

2. Whether the holding of non-preemption in *De Veau* v. *Braisted* 363 US 744 should not be re-examined, if found to be controlling.

3. Whether New York Labor Law, Sec. 722, 723, insofar as it prohibits employers as a class from holding elective office in labor organizations, is a Bill of Attainder.

4. Where the complaint tendered an issue of whether a state stautue was repugnant to Constitution Art. I, Sec. 10 Cl:1 as an attainder, together with an issue of preemption, did a single judge District Court have jurisdiction to dispose of either issue or of both issues and did the Court of Appeals have jurisdiction to review the judgment entered by the single judge.

Statutes Involved

Labor Management Reporting and Disclosure Act of 1959, Publ. L. 86-257, 73 Stat. 519, 29 USC 401 et seq.

Section 401(e), 73 Stat. 532; 29 USC § 481(e)

> In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed), and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof . . .

Section 402(o); 73 Stat. 520; 29 USC § 402

> "Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

Section 403; 73 Stat. 534; 29 USC § 483

> No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this subchapter. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior

to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

Section 604: 73 Stat. 540; 29 U.S.C. 524.

Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes.

New York "Labor and Management Improper Practices Act" Art. 20-A Labor Law, Secs. 720-732. Laws 1959 Chap. 451:

Sec. 722. **Fiduciary Obligations of Officers and Agents.**—No officer or agent of a labor organization shall, directly or indirectly

1. Have or acquire any pecuniary or personal interest which would conflict with his fiduciary obligation to such organization;

2. Engage in any business or financial transaction which conflicts with his fiduciary obligation; or

3. Act in any which subordinates the interests of such labor organization to his own pecuniary or personal interests.

Sec. 723. **Specific Prohibited Financial Interests and Transactions.**—1. Without limiting his fiduciary obligation provided in section seven hundred twenty-two, it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization:

(a) To have, directly or indirectly, any financial interest in any business or transaction of either an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or an employer who is in the same industry as such an employer;

(b) To have, directly or indirectly, any financial interest in the business or transaction of any person who sells to, buys from, or otherwise deals with (i) an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or (ii) an employer organization which represents such employer, or (iii) an employer who is in the same industry as such an employer;

* * *

Sec. 725. **Enforcement of Fiduciary Obligations.**—1. Where an officer or agent of a labor organization has violated or is violating any of his obligations provided in sections seven hundred twenty-two and seven hundred twenty-three, such labor organization and the parent organization of such labor organization shall each have the right to bring an action or proceeding in any court of competent jurisdiction for legal or equitable relief to redress such violation of obligation. Any member of such labor organization shall have the right to bring such action or proceeding if (a) after request by any member that such action or proceeding be brought, such organization shall fail to do so, or (b) such request would be futile, or (c) such organization has failed to prosecute diligently any such action or proceeding which it has brought.

* * *

4. Each wilful and knowing violation of any of the provisions of sections seven hundred twenty-

three or seven hundred twenty-four of this article shall constitute a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

Statement of the Case

Plaintiff was for many years President and sole stockholder of Sound Associates, Inc, (R. 19, 20; 15a, 16a).* That corporation employs members of Theatrical Protective Union No. One, a labor organization affiliated with International Alliance of Theatrical Stage Employees, AFL-CIO (R. 19; 15a). The corporation further is a party to a collective bargaining contract with that Union covering the wages, hours and working conditions of its employees (R. 19; 15a). The Union is in commerce (R. 18; 14a).

Plaintiff was also a member in good standing of Theatrical Protective Union No. One (R. 1; 3a). He became a candidate for and was elected President of that Union in June, 1964 (R. 3; 5a). The term of office is one year and he was reelected in 1965 and 1966 (*id.*). The electorate was aware of his interests in the employing corporation (R. 3, 19; 5a, 15a).

Defendant, the Industrial Commissioner of New York State, administers a New York Statute, the "Labor and Management Improper Practices Act.", Article 20A, New York Labor Law, which prohibits an officer of a labor union from having any financial interest in a business employing members of his union (R. 3; 5a). Defendant threatened to prosecute plaintiff, since the New York Act imposes a criminal sanction (R. 4, 11-12; 6a, 8a-9a).

Plaintiff sued in the District Court for declarative and injunctive relief against prosecution under the State Act (R. 5; 7a) on the grounds

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* Numbers following the record page and having a suffix "a" refer to the printed page of the appendix below.

1. That the applicable Federal Act, granting to every member in good standing of a union the right to be a candidate for and to hold office, preempted the operation of the State Act (R. 1-4; 3a-6a).

2. That the State Act, insofar as it excludes employers as a class from holding union office is a bill of attainder prohibited to the States by the Federal Constitution (R. 4-5; 6a-7a).

Jurisdiction in the District Court was laid on the ground of a federal question, the requisite jurisdictional amount being alleged (28 USC 1331) and on the further ground that the controversy arose out of an Act of Congress regulating commerce (28 USC 1337) (R. 1; 3a). The complaint suggested the convening of a three-judge District Court (29 USC 2281, 2284) since an injunction was being sought against the operation of a state statute (R. 5; 7a).

The District Court, holding that the Federal Act did not preempt the State Act, and that the attack on the attainder ground was insubstantial, declined to convene a three-judge court and granted judgment of dismissal summarily (Op. R. 141; 21a: Judg. R. 154; 29a). The Second Circuit Court of Appeals affirmed (R. 172; Op. R. 158).

REASONS FOR GRANTING THE WRIT

I. The Preemption Question

A. The Conflicting Statutes

Title IV of L.M.R.D.A., 29 U.S.C. 401 (e) provides, in presently material part

> "(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uni-

formly imposed) . . . The election shall be conducted in accordance with the constitution and by-laws of such organization insofar as they are not inconsistent with the provisions of this title."

Congress affirmatively barred the states from legislating in the field of union office-holding. It provided (Sec. 403, 29 USC 483)

> 'No labor organization shall be required by law to conduct elections . . . in a different form or manner than is required by its own constitution or by-laws, except as otherwise provided by this title . . ."

New York State, on the other hand, after imposing on union officials (Labor Law, Sec. 722) a generic fiduciary responsibility in much the same terms as the cognate Federal Statute, 29 USC 501, specifically prohibits an official of a union from having an employer interest. The language is:

> "Without limiting his fiduciary obligation provided in section seven hundred twenty-two, it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization:
>
> (a) To have, directly or indirectly, any financial interest in any business or transaction of either an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or an employer who is in the same industry as such an employer;"

The remedial provisions of the New York Statute permit a civil action by the union or its members (Labor Law Sec. 725 (1))

> "to redress such violation of (fiduciary) obligation".

They also authorize a criminal prosecution in the following language (Labor Law, Sec. 725.4):

> "Each wilful and knowing violation of any of the provisions of sections seven hundred

> twenty-three or seven hundred twenty-four of this article shall constitute a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both."

As applied to the facts of this case, where a good-standing member of a union, known by the union electorate to be an employer, was nevertheless elected to the post of President of the Union, the statutory conflict is apparent.

B. The Resulting Question

Petitioner claims that the New York Statute imposes a qualification upon union office holding or, at least, a burden thereon so onerous that it amounts to a qualification and that the legislative history (post p. 13) affirmatively shows that Congress committed to union electorates, not to the states, the resolution of which conflicts of interest in candidates should disqualify a member in good standing from holding union office.

Respondent, on the other hand, claims that the New York Statute is not substantive but remedial; that it lays no qualification on the holding of union office but merely requires that the union official divest himself of the conflicting interest and that Congress left the states free to enact remedial legislation in the fiduciary field.

Petitioner does not dispute that Congress left the states free to enact remedies or even stricter obligations controlling the conduct of fiduciaries; he does, however, contend that Congress reserved to union membership the selection of the persons who shall become fiduciaries and that the legislation under review trespasses upon that right of the union membership when it calls upon a successful candidate radically to alter his personal circumstances which were known to and, mayhap, relied on by that portion of the electorate which was his majority.

The question then is not whether New York may enact concerning the obligations of fiduciaries and the remedies

for their breach; it is whether New York has taken away from the union members their right to elect, with full knowledge of his putative personal conflict of interest, an individual to union office.

The issue "Who may be a union officer? is distinctly different from the issue "What are the obligations of union officers?" Petitioner has framed the "Question presented" in terms of the former issue.

C. The Case Law

While there is much in the legislative history which must be examined (post p. 13) the ultimate question will boil down to an examination of whether New York's legislation will operate as a deterrent to candidacy or to office-holding on the part of a member in good standing. While the candidacy of any particular member may be of importance to him it is not primarily for the benefit of prospective candidates that Congress has legislated a right of candidacy; the right exists so that the membership as a whole may enjoy a full range of selection to promote a "vital public interest in assuring free and democratic union elections".*

Regardless of the sanctions by which it is enforced, there is little doubt that the New York Act seeks to prohibit union office to one simultaneously holding what New York characterizes in its catchline as a "Specific prohibited financial interest"; in this case, an employer status. The test of whether this interferes with the membership's selection of its officers is not to be found in the number of its members whose candidacy will be discouraged by the prohibition, but by whether the restriction is so grievous that any candidate will be discouraged. The Federal Act extends the right of candidacy to "every" member.

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* *Wirtz* v. *Local 153 Glass Bottle Blowers' Association*, No. 57. O. T. 1967 decided January 15, 1968, 390 U.S.

Necessarily, the effect on any given candidate will vary with his personal circumstances. On those having no conflicting interest at all, there will be no discouragement whatever. On prospective candidates such as Petitioner, who has built up a highly specialized and personalized business which he would be forced to dispose of at great financial sacrifice the discouragement would be grievous indeed. There will, of course, be intermediate degrees of discouragement.

And it may be, that in a given case, the electorate may wish to select a particular candidate for the very reason that his means of livelihood are independent of the control of union dispatchers or union business agents through a hiring hall or similar hiring practice, especially where the business agents' day-to-day actions are not under the control of the President or other officers.

The effect on any given candidate will also vary with the organization of the particular union. In many unions, of which Theatrical Protective Union No. 1 is an instance, the post of President is unsalaried and the incumbent depends on other sources of income for his living. If his sole source of income is work at the trade, and the hiring mechanism is to be in the control of his political opposition,* it would be a very hardy member whose candidacy would not be discouraged. Yet it may be the political *desideratum* of the membership to have a President who is not under the thumb of the business agent. This may be the avenue of escape for the membership from the "established and perpetuated dynastic control ** of their union."

We cannot neglect to take into account the alternative to divestment. A union official elected by voters knowing of his conflict of interest, may be forced to resign his office

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* For an instance of the use of the hiring mechanism as an instrument for preventing the formation of an internal political opposition cf. *NLRB.* v. *Nassau-Suffolk Contractors Assn.*, 293 F2nd 187.

** *Wirtz* v. *Local 153 Glass Bottle Blowers Association*, No. 57 O.T. 1967 Decided January 15, 1968, 390 U.S. —.

if divestment presents too rigorous a choice for him. Obviously in that case, the will of the voters, which Congress struggled to preserve, will be nullified.

Congress, in enacting the right of candidacy, as shown by the legislative history (*post,* p. 13) appears to have been trying to vest in the union membership this very choice between, on the one hand, a candidate with a known conflicting interest but whose status would enable him to challenge a dynasty, and, on the other hand, a candidate who, however free of conflict of interest, would be so exposed as to his means of livelihood that his administration would be rendered impotent.

> " 'Full freedom' to choose an agent means freedom to pass upon that agents' qualifications"

said this Court in *Hill* v. *Florida,* 325 US 538 (1945). The qualifications imposed by Florida, *viz.,* the payment of a nominal fee, citizenship for 10 years, freedom from conviction for felony and good moral character appear to be much less discouraging to the candidate than the qualification in this case.

The learned Court below, however, declined to apply the *Hill* doctrine and expressly questioned whether it had not been overruled as to LMRDA by the plurality opinion in *De Veau* v. *Braisted,* 363 U.S. 144 (196a). Assuming *Hill* to be viable law, what it stands for is the proposition that any state law which limits, however slightly, the range of selection permitted an electorate by Congress is inapplicable under the Supremacy Clause. That is the proposition which controls this case.

As to whether *De Veau* overruled *Hill,* the prevailing opinion did not pretend that it did; it rested on the enabling Act of Congress underlying the interstate New York Waterfront Compact. Even the dissenting Justices did not conceive that *Hill* had been overruled, they merely expressed wonderment that the prevailing opinion had not undertaken to overrule *Hill.* But *DeVeau* is distinguishable; it rested

on Congressional Legislation controlling a specialized situation not existing in the case at bar; the claim of preemption rested on Section 504(a) of LMRDA rather than, as here, the clearly preemptive Title IV of LMRDA; the state and federal enactments, both seeking to bar felons from union office, were substantially parallel legislation differing only in minor detail and in addition, LMRDA Section 604 expressly permits states to enforce "general criminal laws" as distinguished from laws specially regulating union government.

D. Legislative History

At the outset, Petitioner freely concedes that New York can unquestionably establish from LMRDA and its legislative history that states may freely legislate concerning the responsibilities of union fiduciaries and prescribe remedies for failure to fulfill the enacted responsibilities. And, no doubt, New York does not seriously contend that it has power to control the elective process in unions in commerce.

But the difficulty is that neither of these propositions is helpful in deciding a case where there is a cross-over of the granted and the denied power; where, under color of the granted power to regulate fiduciaries, the legislative result is the forcing out of office of one validly and with foreknowledge of the electorate, incumbent in the office.

Petitioner respectfully submits that the legislative history of LMRDA, not only shows that the states were to be precluded from regulating union elections as such but that Congress affirmatively committed to union electorates the very question which the New York legislation seeks to remove from their control. LMRDA contains a scheme for the resolution of conflicts of interests in which Title II, *Reporting and Disclosure,* particularly in its provisions for the reporting by elective officials of their personal putatively conflicting interests (Section 202, 29 USC 432) is integrated with the elective process of Title IV in order that the electorates may use the information to vote out of

office those whose personal interests, in the sole discretion of the voters, present deleterious conflicts.

The Senate Committee Report (No. 187 on S 1555, p. 14, 1 Leg. Hist. LMRDA 410, 411) states

> "The Committee bill attacks (the conflict of interest) problem by requiring union officers and employees to file reports with the Secretary of Labor disclosing to union members and the general public any investments or transactions in which their personal financial interests may conflict with their duties to members. * * *

The Committee goes on to explain why, rather than disqualifying from office those who had conflicts of interest, it merely required the "milder sanction" of disclosure (No. 187 on S 1555, p. 16, 1 Leg. Hist. LMRDA 412):

> "There are three reasons for relying upon the milder sanction of reporting and disclosure to eliminate improper conflicts of interest:
>
> 1. The searchlight of publicity is a strong deterrent. This is a new and treacherous field for legislation. Apart from a few narrow statutes there are no general laws imposing criminal penalties upon those who enter into conflicts of interest in breach of fiduciary duties. Before adopting extreme measures it is wise to see whether milder sanctions are sufficient.
>
> 2. The requirements of reporting and publication will help the labor unions to better regulate their own affairs. The members may vote out of office any individual whose personal financial interests conflict with his duties to the members . . .
>
> 3. The reports would furnish a sound factual basis for further action in the event that other legislation is required."

Congress looked to the union electorates, not to the states, to clean their respective houses. This was aptly expressed by the Committee in a segment of the Report entitled

"Racketeering, Corruption and Conflicts of Interest." It said (No. 187 on S 1555 p. 12; 1 Leg. Hist LMRDA 408):

> "the ultimate responsibility rests upon individual union members to insure that their unions are efficiently and honestly run by taking a more active interest in the affairs of their organizations. Voluntary efforts will be speeded and strengthened by the provisions of the committee bill requiring full financial reports and public disclosures."

Indeed, the enactment of a requirement that individual union officials report their respective personal conflicts of interest makes no sense at all unless its design was to inform the electorates of unions. LMRDA contains no prohibition against the mere existence of a conflict of interest; neither the Secretary of Labor nor individual union members nor anyone else is authorized to bring suit or to proceed criminally upon the information disclosed. The solitary purpose of Section 202 (29 USC 432), is to inform electorates so that they may act at the ballot box.

Thus considered, Title II of the Act, the reporting and disclosure requirements, is as integral a part of Title IV, the election requirements, as are the limitations on frequency of elections. And if New York may say that a man with a conflict of interest may not hold fiduciary union office, why may not Florida say that a man who cannot establish the good moral character essential to the discharge of fiduciary duties shall be barred from union office?

It is significant that after mature consideration of conflicts of interest in union officials, Congress decided to bar from union office only Communists and felons. (Section 504, 29 USC 504). Thus it carried out the design of the Committee report to vest in union electorates the resolution of conflicts of interests.

The learned Court below seems to read Section 403, Title IV (29 USC 483) designed to prevent state law from intruding into matters covered by the election provisions of LMRDA restrictively.

> "No labor organization shall be required by law to conduct elections . . . in a different form or manner than is required by its own constitution or by-laws, except as otherwise provided by this title . . ."

It seems to regard the words "form or manner" as relating only to the mere mechanical aspects of elections, such as frequency of election, secrecy of ballot and the like. This court has recently cautioned against a literal reading of labor legislation which fails to take into account the Congressional design.* The right of candidacy, especially added to the original Senate bill**, is an integral part of the Congressional design which encompassed resolution by the electorate of conflicts of interest. There is no reason for reading the perhaps inartful words "form or manner" as encompassing less than the whole of the Congresssional design embodied in Title IV.

Even when it authorizes state court action prior to union election, Congress is careful to confine that action to grounds rooted in the union constitution and by-laws. This imports that Title IV LMRDA and the laws of the respective unions together form the law of union elections and that law is federal and is intended to be insulated from intrusion by any state law. The language is (Section 403; 29 USC 483)

> "Existing rights and remedies to enforce the constitution and by-laws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter."

The legislative history also shows an anxiety on the part of Congress to avoid cross-over effects on the elective

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* *Wirtz* v. *Local 153 Glass Bottle Blowers Association,* 390 U.S. —.

** "The Kennedy-Ervin bill (S. 505) as introduced, provided merely that a reasonable opportunity be given to nominate candidates. In committee, minority members offered the amendment that every member in good standing be eligible to be a candidate, to hold office, and to support the candidate of his choice without being subject to penalty, interference or reprisal of any kind by the Union or its officers. This amendment was accepted . . . (2 Leg. Hist LMRDA 1850; Cong. Rec. Oct. 2, 1959 App. 8516)

process of Title IV whereby states, in the exercise of reserved power in some other field would intrude into the elective field. It has before been noted that violation of the New York Act carries a penal sanction. As reported by the Senate Committee, Section 604 of Title VI (29 USC 524) read:

> "Nothing in this Act shall be construed to impair or diminish the authority of any State . . . to enforce its own criminal laws." (S.R. No. 187 on S.R. 555, p. 53-54; 1 Leg. Hist. LMRDA 390)

It was amended on the Senate floor, on motion of Senator Morse accepted by the floor manager of the bill, the then Senator John F. Kennedy to read, as finally enacted:

> "Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any such crimes."

Senator Morse explained why the broad authority given to the states in the criminal field had to be limited (Cong. Rec. Apr. 24, 1959, p. 5991; 2 Leg. Hist. LMRDA 1214):

> "Without the amendment it might be possible to argue that any State statute dealing with matters specifically covered in the bill, such as the provisions limiting the tours of office of union officers—would be valid if enacted as a criminal statute."

The learned Court below read this legislative history as a declaration against preemption, which, indeed, it is. But it is a limited saving clause, for the word "general" obviously is used in contrast to "matters specifically covered by (LMRDA)". Thus since the right to hold office is specifically covered we are forced back to the question of whether the New York Act cuts down the right to hold union office. If it does, it is preempted; if it does not, it may stand.

E. Importance of the Question

1) The controversy concerns an area of Federal-State relations in which not only states, but municipal bodies * are constantly legislating and the guidance of this Court is needful.

2) The law in the subject area has now become unsettled by the construction placed by the Court below on the *Hill* and *De Veau* cases.

3) The question, transcending the facts of this case, as to whether the resolution of conflicts of interest lies within the province of union electorates or elsewhere, with the possible sequel that candidates will resort to civil actions in the courts rather than to the ballot box requires resolution in order that it may not have an unsettling effect on future union elcetions.**

4) Entrenched union officials may seek to use the conflict of interest ground to abort nomination of opposing candidates if the question be not settled; in many trades a man is a contractor one day and a journeyman the next and these trades will be particularly subject to such techniques.

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* Municipal licensing ordinances, despite *Staub* v. *City of Baxley*, 355 U.S. 313, continue to proliferate; Pollitt, D. H. *"Free Speech for Mustangs and Mavericks"*, New York Law Journal, Mar. 7, 1968, p. 4, cols. 5, 7.

** The New York Act here considered provides, arguably, a vehicle for attacking a candidacy in the civil action "to redress violations of (fiduciary) obligations" Sec. 725(1).

II. The Attainder Question

Petitioner's attack on the attainder ground was based on *U.S.* v. *Archie Brown*, 281 US 437 (1965), holding that the barring of Communists from Union office was an attainder, and the Respondents' counter argument was based on *Board of Governors* v. *Agnew*, 329 US 441 which the Court in the *Brown* opinion distinguished.

But the New York legislation now before the Court is not as easily distinguishable as *Agnew*; the structure of the New York Act precludes such easy disposition. Section 722, Labor Law, sets out a generic prohibition against a union official having any pecuniary or personal interest which would conflict with his fiduciary obligation, or engaging in any conflicting business or financial transaction or acting in any way which subordinates union interests to pecuniary or personal interests.

If the New York Act stopped there, with that generic prohibition, there would be no substance to an attainder claim. Obviously Section 722 specifies no person or class of persons as offenders; it leaves open to the examination of the judicial branch of government the question of which person has a putative conflicting interest; of whether, in the particular circumstances, the putative conflicting interest presents an actual conflict; of whether a disclosure exculpates the conflict; and of whether the conflict, in the particular circumstances, is of such gravity as to warrant governmental sanction.

Section 723 is something different. Its catchline is, significantly, and meaningfully:

> "Specific prohibited financial interests and transactions".

Its introductory words are

> "Without limiting his fiduciary obligations provided in section even hundred twenty-two . . . "

That introduction carries out the note sounded in the catchline, *i.e.*, that although the legislature is proceeding from the generic the specific, it leaves standing the generic condemnation of conflicts of interest. Then it proceeds to instruct the judicial branch of the government precisely whom it must convict of a conflict of interest. This is an "exercise in specification" such as is condemned by the Bill of Attainder Provision of the Federal Constitution.

U.S. v. *Archie Brown*, 381 U.S. 437.

The form of the New York Statute precludes any contention that, in this enactment, the Legislature was merely trying to express in "an alternative shorthand way" characteristics undesirable in union officials. The characteristics are set out in full in Section 722; Section 723 describes the guilty parties.

The Court, in *Brown*, distinguished an earlier conflict of interest case, *Board of Governors* v. *Agnew*, 329 US 441, which sustained a statute barring simultaneous holding of interest in securities underwriting firms and in national banks on these grounds:

> 1. The *Agnew* statute condemned no political group.
>
> 2. The *Agnew* statute condemned all men.
>
> 3. The *Agnew* statute was a "shorthand way" of designating undesirable characteristics.

We have already disposed of the third distinction by pointing out that the undesirable characteristics are set out fully in Section 722 and that Section 723 is an "exercise in specification". The second distinction is answerable in the same way; after a generic statutory prohibition covering "all men" the statute goes on to specify a particular class of men-employers—as violators.

The learned Court below rested its determination on this point on the comment in the *Brown* case relative to

Agnew, *viz.*, that the situation presented a "temptation to any man." But Congress in writing the statute held to be an attainder had said in effect—it was really a conflict of interest regulation—that union office holding presented "a temptation to any Communist-man", as it surely would to a dedicated communist.

In precisely the same vein, New York says, in Section 723, that union office holding presents "a temptation to any employer-man." The employer is convicted not for any malfeasant act—but for being who he is—an employer.

It is quite certain that in any prosecution undertaken by Respondent he will prove no "undesirable characteristics"; he will merely prove that Petitioner is an employer and he will object to evidence tending to show that there is no conflict of interest or that the conflict in the circumstances is *de minimis* or exculpated.*

This leaves the political distinction. This is, of course, and perhaps must needs remain a somewhat elusive concept. But anyone who has lived through the depression would have little difficulty in recognizing the existence of an "anti-employer" political mentality; indeed the word "Tory" was bandied about in those times as a synonym which carried the implication that employers were a group subversive of the then current popular will. Congress later gave recognition to the fact that the temper of the times had, in the preamble of the Wagner Act, indicted employers as a class by amending that preamble so that

> "the findings will not hereafter constitute an indictment of all employers" **

On their own part, employers have been politically active with some unity of purpose at least since the begin-

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* In contrast, LMRDA in imposing fiduciary responsibility (Sec. 501; 29 USC 501) "take(s) into account the special problems and functions of a labor organization".

** House Conference Report No. 510 on H.R. 3020, 1 Leg. Hist. LMRDA 534.

nings of the industrial revolution. Adam Smith notes the influence of "merchants and master-manufacturers" on legislation in Britain and in Europe, noting that the laborers' voice was seldom heard "in public deliberation" except "when his clamour is animated, set on and supported by his employers, not for his, but for their own particular purposes".*

The Norris-La Guardia Act, Section 2 (29 USC 102) notes the then current political success of employers:

> "Whereas under prevailing economic conditions, developed with the aid of governmental authority . . ."

The Wagner Act (49 Stat. 449; former 29 USC 151) noted the then current concert of action among employers:

> "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining . . ."

Congress has in several enactments recognized the "political group" status of employers by assigning them, as such, functions in governmental action; the "Code Authorities" of the National Industrial Recovery Act in the legislative field; the several War Labor Boards in the legislative and quasi-judicial fields and the National Railroad Adjustment Board in the quasi-judicial field, to mention a few.

It is impossible to say that Communists are a political interest group and employers are not a political interest group. The degree of organization cannot be the test; the *Brown* case depended on distinguishing what might be called "the organized Communist" from those outside the dedicated, knowing central core.

The real thrust of the "political" distinction mentioned in the *Brown* case lies probably less in the governmental objective of the supposed "political" group than in the abuse of the group designation as a means of convicting

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* Wealth of Nations, Bk. 1, Ch. XI, Pt. III, *et passim.*

the possibly guiltless. The *Brown* Court did, after all, recognize that the Congress could interdict the "subversive Communist" if it limited its net to subversives. This is the point of its abstraction from *Schware* v. *Bar Examiners*, 353 U. S. 232, 246, of language which might be paraphrased for our present purposes as follows:

> "... it cannot automatically be inferred that 'all (employers) share (the) evil purposes (of some employers) or participate in their illegal activities.'"

The flaw really lies in the creation of a conclusive presumption or rule of law which allows no room for proof that a man may be a non-subversive Communist or an employer honestly administering his trust as a labor union official; the legislature has prejudged the issue; it relies on a stereotype.

Appellants' affidavit in opposition to the summary judgment motion below sets forth (R21-23; A-17a-19a) some rather cogent reasons why not all employers are subject to temptation in occupying labor union posts; in many cases the employer's interest as such is well served by honest administration of unions organized on the craft principle. Yet the New York Act would not permit such proof.

Horace Greeley, who, though an employer, was a "founding father" and first President of New York Typographical Union No. 6 ("Big Six") could not have defended himself under Section 723. Overbreadth is the real objection to political categorization.

The attainder question has been separately presented as a matter of editorial convenience. Petitioner understands that if the Court finds that the question is substantial enough to warrant grant of certiorari, the Court may have ousted itself of jurisdiction, since a three-judge District Court may have had jurisdiction and review here could have been had only by appeal.

III. The Three-Judge Court Question

Petitioner would much prefer to avoid relitigation of this case at the District Court level; the question of the three-judge District Court would not have been raised at all but for the fact that the statute, rather than placing the responsibility of forum-selection on the public officials charged with protecting state interests, places the responsibility on all litigants.

Petitioner concedes that, if the attainder question be insubstantial, the Courts below acted in accord with the latest pronouncement of this Court, *Swift Co.* v. *Wickham*, 382 U.S. 111, and the Court of Appeals had jurisdiction.

However the case at bar appears to be somewhere in between the *Brown* and *Agnew* principles, and not clearly covered by either; thus the resulting question appears substantial and the three-judge District Court required.

Petitioner points out on the other hand that, if he were to prevail on the preemption question, his standing to raise the attainder question would be destroyed, since one may not attack a statute which does not apply to him. The preemption issue thus had a dual bearing in this case; not only was it a substantive claim but its resolution was a required prelude to determining whether the plaintiff could raise the attainder question at all. In this sense, although the complaint directly raises a count of repugnancy, it presented a contingent constitutional question. *International Ladies Garment Workers Union* v. *Donnelly Garment Co.*, 304 US 243. This may suggest to the Court that the single judge District Court had jurisdiction of the entire case and, consequently, that the Court of Appeals had jurisdiction, wherefore certiorari is the proper mode of review.

CONCLUSION

For the stated reasons, this petition for a writ of certiorari should be granted.

Dated April 5, 1968.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—September Term, 1967

(Argued November 30, 1967 Decided January 2, 1968)

Docket No. 31209

THOMAS H. FITZGERALD,

Plaintiff-Appellant,

against

MARTIN P. CATHERWOOD, as Industrial Commissioner of the State of New York,

Defendant-Appellee.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, John M. Cannella, *J.*, granting appellee's motion for summary judgment on the ground that New York Labor Law §§ 723, 725.4 do not constitute a Bill of Attainder and are not preempted by the Labor Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 401, et seq.

Affirmed.

BERNARD H. FITZPATRICK, New York, N. Y. (Butler, Fitzpatrick & De Sio, Thomas Sheehan, of counsel), *for appellant.*

JOEL LEWITTES, Assistant Attorney General State of New York (Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for appellee.*

KAUFMAN, *Circuit Judge:*

The issue before us on this appeal is the validity of those provisions of New York's Labor and Management Improper Practices Act which make it a misdemeanor for an officer of a labor organization to hold a financial interest in an employer whose employees the organization represents.[1] The appellant, Thomas H. Fitzgerald, sought

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[1] New York Labor Law §723 provides:

1. Without limiting his fiduciary obligation provided in section seven hundred twenty-two, it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization:

(a) To have, directly or indirectly, any financial interest in any business or transaction of either an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or an employer who is in the same industry as such an employer;

(b) To have, directly or indirectly, any financial interest in the business or transaction of any person who sells to, buys from, or otherwise deals with (i) an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or (ii) an employer organization which represents such employer, or (iii) an employer who is in the same industry as such an employer;

New York Labor Law §725 provides:

4. Each wilful and knowing violation of any of the provisions of sections seven hundred twenty-three or seven hundred twenty-four of this article shall constitute a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

a declaratory judgment in the court below decreeing that the challenged legislation is preempted by the Labor Management Reporting and Disclosure Act of 1959 [LMRDA], 29 U. S. C. § 401, et seq., and that it constitutes a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution.[2] In addition, the complaint sought to restrain the state official charged with administering the act from enforcing the legislation. Judge Cannella denied appellant's motion for the convening of a three-judge district court and granted summary judgment for the appellee. We affirm.

I.

The facts are undisputed and can be stated briefly. Fitzgerald concededly wears two hats. He is the duly elected president of Theatrical Union Number One [union] (affiliated with International Alliance of Theatrical Stage Employees, A. F. L.-C. I. O.), and is also president and sole stockholder of Sound Associates, Inc., a corporation which has a collective bargaining agreement with the union and employs union members. The union represents workers in the theatrical and television broadcasting industries and is certified by the National Labor Relations Board; Sound Associates is engaged in several phases of these industries concerned in the main with electronic auditory equipment. The state concedes that the union membership was aware of Fitzgerald's position with Sound Associates when he was elected union president. Indeed, his dual position appears to have been a major issue in the election. It is also conceded that Fitzgerald's relationship with the union and the corporation constitutes a violation of the New York act. It is clear, moreover, that the appellee has threatened to enforce the penal provisions of the act and has called

[2] Art. I § 10 provides in pertinent part that: "No State . . . shall pass any Bill of Attainder."

upon Fitzgerald to divest himself of his interest in Sound Associates (or, we presume, resign his union office). Thus, this is not a case in which a litigant seeks to enjoin a state prosecution which may never materialize. We are squarely faced, therefore, with the need to evaluate the merits of appellant's contentions.

II.

Whatever may have been the law in the past, no authority need be cited for the clearly accepted principle that Congress has the power to regulate labor relations—including the qualifications for, and the fiduciary obligations of, union office—in industries affecting interstate commerce. We state this at the outset to clarify what we are not concerned with—the extent of national power. Instead, we must direct our attention to the scope and limitations of the actual regulation. There is little doubt that when Congress indicates an intent to preempt an area over which there is federal jurisdiction, the Supremacy Clause of the Constitution precludes the states from legislating in that field. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 229-30 (1947). But, the Supreme Court has given us this caveat:

> "[i]n areas of the law not inherently requiring national uniformity . . . state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' " *Head* v. *Board of Examiners*, 374 U. S. 424, 430 (1963) (citation and footnote omitted).

That the federal and state enactments may serve the same end is not determinative of the question. Before finding preemption "we must be able to conclude that the purpose

of the federal statute would to some extent be frustrated by the state statute." *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines*, 372 U. S. 714, 722 (1963). See also *Nash* v. *Florida Industrial Commission*, 36 L. W. 4046 (Dec. 5, 1967). With this principle in mind, we conclude that there is no conflict between the LMRDA and the challenged provisions of the New York act.

The federal and state statutes—both passed in 1959—were designed to impose curbs on a variety of corrupt practices by union officials which had come to light in various investigations. Compare 29 U. S. C. § 401, with N. Y. Labor Law § 720. Accordingly, both statutes contain provisions dealing with the fiduciary responsibilities of officers and agents of labor organizations. 29 U. S. C. § 501; N. Y. Labor Law §§ 722-23. We do not understand the appellant to maintain that there is a conflict between the fiduciary provisions of the two laws. Indeed, such a contention would have little merit. Section 501 of the LMRDA imposes a duty on all union officials "to refrain from dealing with such organizations [the unions they represent] as an adverse party . . . and from holding or acquiring any pecuniary or personal interest which conflicts with the interest of such organization." And, the Congressional debates disclose that "the principle of fiduciary responsibility is violated whenever a union officer acquires an interest in a business concern with which he engages in collective bargaining as an employees' representative."[3]

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[3] 105 Cong. Rec. 14213 (daily ed. Aug. 11, 1959) (speech of Representative Elliott). The wording of Section 501, as enacted, precisely conforms with the fiduciary responsibility provision of the bill sponsored by Representative Elliot. The Elliot Bill was reported by the House Committee on Education and Labor but the Landrum-Griffin Bill was substituted on the floor of the House by way of amendment. See Dugan, Fiduciary Obligations Under the New Act, 48 Geo. L. J. 277, 291 (1959).

Since the New York legislation merely imposes and additional remedy if a union officer acquires such an interest, it can hardly be said to frustrate the Congressional purpose.

Appellant's contention, however, has more subtlety. He argues that the state law conflicts with the election provisions of the LMRDA. In particular, he urges that Section 401(e), 29 U. S. C. § 481(e), which provides in relavant part, that

> "every [union] member in good standing shall be eligible to be a candidate and to hold office"

and Section 403, 29 U. S. C. § 483, which states that

> "[n]o labor organization shall be required by law to conduct elections . . . in a different form or manner than is required by its own constitution or by-laws, except as otherwise provided by this subchapter"

manifests a Congressional intent to bar the states from imposing additional qualifications for holding union office. And, he directs our attention to statements in the legislative history which he says make it evident that Congress recognized a need for national uniformity in the laws governing union elections, S. Rep. No. 187, 86th Cong., 1st Sess. 21-22 (1959); that Congress had decided to leave to the union members themselves the responsibility of deciding who could or could not be trusted with union office particularly where the possible conflicts of interest had been disclosed pursuant to the reporting and disclosure provisions of the act, *Id.* at 16.

The Industrial Commissioner's response to this claim is that the New York enactment does not prohibit any union member from being elected to union office; it merely imposes fiduciary obligations upon those elected. He urges

that a duly elected officer can comply with the requirements of the New York law without in any way violating his duties under the LMRDA. All he need do is to divest himself of his financial interest in the employer—the very thing the Commissioner requested Fitzgerald to do in this case. The question remains, therefore, whether there is any reason to preclude the state from legislating in this area which concerns itself principally with possible interest conflicts or from enforcing its fiduciary requirements by means of the criminal law.

The legislative history of the LMRDA discloses considerable time and thought devoted to the relationship *inter se* of federal and state law and to the problem of federal preemption.[4] Congress provided different solutions in different sections of the act. Professor Summers has stated:

> "The relationship of federal and state remedies in union elections is totally different from that in other areas, for title IV [dealing with elections] proceeds from opposite premises. In direct contrast to . . . [those provisions] which permit each state to superimpose its rights and remedies on a federal guaranteed minimum, title IV constitutes a comprehensive code which is to provide a single uniform body of law." Summers, Pre-emption and the Labor Reform Act—Dual Rights and Remedies, 22 Ohio St. L. J. 119, 135 (1961).

Congress was obviously concerned not to make it unduly burdensome or even impossible for unions functioning in several states to comply with a myriad of conflicting election laws. S. Rep. No. 187, 86th Cong., 1st Sess. 21-22 (1959). The focus of attention was on the need to have uniform rules governing the procedural aspects of union

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[4] See, e.g., 105 Cong. Rec. 5819-20 (daily ed. April 22, 1959).

elections. Thus, the Senate committee report cited as an example of its concern the undesirability of having too frequent elections for this could result in instability in collective bargaining relationships with employees. *Ibid.*

Congress' solution to the problem of the relationship of federal and state law was quite different when it dealt with fiduciary obligations. It sought to establish a federal minimum norm and did not intend to reduce or interfere with obligations imposed by state law. 105 Cong. Rec. 5856-61 (daily ed. April 23, 1959); Summers, Pre-emption and the Labor Reform Act, *supra*, at 140. Accordingly, Section 603(a), 29 U. S. C. § 523 (a) provides that:

> "Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . . under any Federal law or under the laws of any State . . . ."

And this section—which has been described as "an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided," *De Veau* v. *Braisted*, 363 U. S. 144, 157 (1960) (plurality opinion)—originated as a savings clause incorporated in the fiduciary obligation provision added during the Senate debate. 109 Cong. Rec. 5860 (daily ed. April 23, 1959). See Summers, Pre-emption and the Labor Reform Act, *supra* at 140.

The divergent treatment of preemption with respect to the election and fiduciary sections of the LMRDA is not difficult to rationalize. There does not appear to be a pressing need for national uniformity in defining or safeguarding fiduciary responsibilities. Conflict-of-interest laws set down standards of acceptable and objectionable behavior. We cannot conceive of any unreasonable burden placed upon union officers required to comply with the

fiduciary requirements of the various states in which their unions function. This is especially true where, as here, the state enactment merely imposes a different remedy for behavior that lies within the scope of the federal act. The mandate of Section 603(a) seems apparent to us.

Appellant insists, however, that even if the LMRDA permits the states to impose additional fiduciary obligations on union officers, it does not permit them to enforce those obligations by means of the criminal law. To shore up his argument he points to Section 504(a), 29 U. S. C. § 504(a), which disqualifies two classes of persons from holding union office—communists and certain felons—and to Section 604, 29 U. S. C. § 524, which provides that nothing in the LMRDA shall be construed to impair the authority of the states to enforce general criminal laws concerned with certain specified offenses. Since, the appellant urges, the violation of fiduciary obligations is not one of those listed in Section 604, Congress intended to bar the states from enacting criminal penalties in that area.

But, as we have noted, Section 603(a) is a clear disclaimer of an intent to preempt "except as explicitly provided to the contrary," and we do not read Section 604 as an explicit limitation of the recognition of state power in Section 603. On the contrary, both sections invite the exertion of state jurisdiction. We see no reason to attribute to Congress an unstated intent to limit the power of the states to legislate in the area of fiduciary responsibility merely because it declared that it did not mean to interfere with the enforcement of general criminal laws.[5] When Congress intended to preempt state law under LMRDA, it left no doubt on that score. For example, Section 205 (c), 29

[5] The offenses specified in Section 604—of which robbery, arson and rape are typical—are precisely those for which conviction bars an individual from holding union office (for five years after the end of his imprisonment) under Section 504. The purpose of Section 604 was to make it manifestly clear that the numerous references in the LMRDA to various offenses was not intended to impair the power of the states to enforce their general criminal

U. S. C. § 435(c), states that "'[n]o person shall be required by reason of any law of any State to furnish to any agency of such State any information included in a report filed [pursuant to the LMRDA]. . . .'"

We are fortified in our conclusion that the LMRDA does not preempt the challenged New York legislation by its legislative history. Frequent references to the state act are made throughout and its merits were discussed during debates in which the relationship of federal and state law was the issue.[6] We recognize, of course, that the determination of Congressional intent is a hazardous undertaking. And we would be hesitant to infer from the discussion of the New York legislation a determination not to preempt the field were it not for the extensive attention given by Congress to the relationship between federal and state law. Under these circumstances we are impelled to the conclusion that if Congress intended to bar the type of provision

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laws. 105 Cong. Rec. 5991 (daily ed. April 24, 1959) (statement of Senator Morse). Senator Morse also stated that:

> "[w]ithout the amendment [ultimately Section 604] it might be possible to argue that any State statute dealing with matters specifically covered in the bill—such as the provisions limiting the tours of office of union officers—would be valid if enacted as a criminal statute." *Ibid.*

But, as the example makes plain, the concern was with those areas of the act where Congress had decided to preempt state power. Nothing in Senator Morse's statement suggests that where Congress specifically recognized state power to legislate, it sought in any way to impose limitations on the remedy the state could provide. On the contrary, Senator Morse carefully noted that:

> "Other sections of this bill refer specifically to the respective responsibilities of State and Federal Governments with regard to the subject matter covered by the bill. Nothing in this section 604 is to be construed as altering those divisions of governmental responsibility as therein defined." *Ibid.*

[6] See, e.g., 105 Cong. Rec. 6667 (daily ed. May 5, 1959) (statement of Senator Morse criticizing New York's legislation); 105 Cong. Rec. 5857-58 (daily ed. April 23, 1959) (statement of Senator Carroll approving the New York act).

New York had enacted, it would have said so explicitly or implicitly. Instead, it provided us with a broad savings clause expressly disclaiming preemption in the area of fiduciary responsibilities.

Nor do we regard *Hill* v. *Florida*, 325 U. S. 538 (1945) as requiring a contrary result. The Court held that the collective bargaining regulations of the National Labor Relations Act [NLRA], 49 Stat. 449, preempted a state statute which provided that no one shall be licensed as a business agent of a labor union who has not been a citizen of the United States for more than 10 years, who has been convicted of a felony or who is not a person of good moral character. The Court reasoned that the statute interfered with the "full freedom" of the union members to choose their agents as guaranteed by the NLRA. *Id.* at 541. But, the continued vitality of *Hill* on this point may be questioned in light of the Court's subsequent holding in *De Veau* v. *Braisted, supra*, that neither the NLRA nor the LMRDA preempted a New York statute which disqualified any person who had been convicted of a felony (and who was not subsequently pardoned) from holding office in any waterfront labor organization. In any event, general observations are not particularly helpful in solving the problem posed. The question of preemption can be answered only after consideration of the particular statutes involved, their legislative history and the underlying policy considerations. This is especially so where, as here, the statute was not drafted in a vacuum but with an eye on the problem of preemption.[7]

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[7] In addition, the state statute in *Hill* not only served as an absolute prohibition against those listed from holding union office but in enforcing the statute the state enjoined the union from functioning as a labor organization under the NLRA. 325 U. S. at 543. The legislation challenged in the instant case does not interfere with the LMRDA in a comparable manner; it is not alleged that the state has threatened to enjoin the union from functioning as a labor organization and Fitzgerald has not been absolutely barred from holding union office. New York only demands that a person who has been elected to union office not serve two masters at the same time.

III.

Appellant also argues vigorously that New York Labor Law § 723 constitutes a Bill of Attainder; it is, he says, an illegitimate "exercise in specification" since it is a legislative condemnation of a political group—characterized by appellant as "employer-man." Appellant places major reliance on *United States* v. *Brown*, 381 U.S. 437 (1965) in which the Court held that Section 504 of the LMRDA—insofar as it bars any person from being an officer of a labor organization during or for five years after the termination of his membership in the Communist Party—constitutes a Bill of Attainder.

But in *Brown* the Court was careful to distinguish conflict-of-interest laws of which Section 723 is an example, and indicated that its holding was not contrary to *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947). In *Agnew*, the Court applied Section 32 of the Banking Act of 1933, 12 U.S.C. § 78, which, *inter alia*, barred any officer of a business enterprise engaged in certain financial transactions from serving as an officer of a member bank of the Federal Reserve System. And, the *Brown* Court stated that Section 32 of the Banking Act differed from Section 504 of the LMRDA on three grounds—all of which also serve to differentiate New York Labor Law § 723. First, Section 504 "inflicts its deprivation upon the members of a political group thought to present a threat to the national security." 381 U.S. at 453.[8] Second, the Banking Act "incorporates no judgment censuring or condemning any group of men . . . . [Congress] concluded that the concurrent holding of two designated positions would present a temptation to *any* man—not just certain men or mem-

[8] The Court in *Brown* was particularly solicitous of individual rights because it was concerned with an area of political association. See Note, The Supreme Court: 1964 Term, 79 Harv. L. Rev. 56, 122-23 (1965).

bers of a certain political party." 381 U.S. at 453-54. (Emphasis in original.) Third, the Banking Act establishes an objective standard of conduct based on the determination that any person who held both positions "might well be tempted" to use his influence in one position to further his interest in the other. *Ibid.* We are of the view that New York Labor Law § 723 and Section 32 of the Banking Law deal with comparable interest conflict problems. In sum, we see nothing in *Brown* to indicate that New York is precluded from making—and acting upon—the eminently reasonable judgment that a person who represents both the employer and the employees at a collective bargaining table "might well be tempted" to use his position as a union officer to further his interests as an employer or that consciously or subconsciously he will be prevented from serving only the best interests of the union members.

IV.

Finally, appellant contends that the District Court should have summoned a statutory three-judge court, 28 U.S.C. §§ 2281, 2284. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965), however, is clear authority that a three-judge court need not be covened in Supremacy Clause cases involving only federal-state statutory conflicts. Moreover, Fitzgerald's contention that a three-judge court should have heard his claim that the New York legislation constitutes a Bill of Attainder is without merit since it has long been settled that even when the challenge to a state statute is based on a substantive provision of the federal Constitution a three-judge court need not be convened if the claim is "insubstantial." *Id.* at 115. And, a contention is insubstantial if it is obviously devoid of merit or if it is barred by decisions of the Supreme Court. *Ex Parte Poresky*, 290 U.S. 30, 32 (1933) (*per curiam*). We agree with the District Court that under the above criteria appellant's Bill of Attainder argument is insubstantial.

Affirmed.

APPENDIX B

Opinion of District Court

65 Civ. 1707

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

CANNELLA, *J.*:

The defendant's motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment, is granted.

The facts involved in this case are uncontroverted. The plaintiff is the elected president of the Theatrical Protective Union Number One (hereinafter referred to as "Union". He is also a director, president and the sole stockholder of Sound Associates, Inc., a corporation which employs members of the Union and has at all times been a party to the collective bargaining agreement covering the wages, hours and working conditions of said employees. The Union is the party representing employees covered by the collective bargaining agreement. Sound Associates, Inc., also deals with employers whose employees in some part are represented, for the purposes of collective bargaining, by the Union. It is further admitted that the Union electorate was cognizant of the plaintiff's interests in the corporation at the time of the election and that both the members of the Union and the corporation are aware of the positions held by the plaintiff in each of the organizations.

The defendant alleges that this relationship clearly constitutes a violation of Sections 723(1)(a)[1] and 723(1)(b)[2] of Article 20-A of the New York Labor Law and it is seeking enforcement of the penal provision of the New York Labor Law for this violation.[3]

The plaintiff alleges that Article 20 of the New York Labor Law is preempted by the Federal Labor Management Reporting and Disclosue Act.[4] He further alleges that Article 20 of the New York Labor Law, insofar as it disables employers, per se, from holding union office, constitutes a Bill of Attainder. The plaintiff therefore seeks an order of this court enjoining the defendant from proceeding with the enforcement of the penal section on the ground of pre-emption and unconstitutionality.

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[1] N.Y.L.L. § 723(1)(a) provides in pertinent part that: "(1) . . . it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization: (a) To have, directly or indirectly, any financial interest in any business or transaction of either an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or an employer who is in the same industry as such employed. . . ."

[2] N.Y.L.L. § 723(1)(b) provides in pertinent part that: "(1) . . . it shall constitute a breach of his fiduciary obligation for an officer or agent of a labor organization. . . . (b) to have, directly or indirectly, any financial interest in the business or transaction of any person who sells to, buys from, or otherwise deals with (i) an employer whose employees his labor organization represents or seeks to represent for the purposes of collective bargaining, or (ii) an employer organization which represents such employer, or (iii) an employer who is in the same industry as such an employer. . . ."

[3] N.Y.L.L. § 725(4) provides in pertinent part that: "Each wilful and knowing violation of any of the provisions of sections seven hundred twenty-three or seven hundred twenty-four of this article shall constitute a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both."

[4] 71 Stat. §§ 519-541 (1959), 29 U.S.C. §§ 401-531.

The plaintiff recognizes that the pre-emption issue does not require a three judge court,[5] but alleges that the issue of an injunction based on the unconstitutionality of a statute requires a three judge court pursuant to 28 U.S.C. § 2281. He therefore requests, in the interest of obtaining a single appealable judgment, that both issues be submitted to the three judge court.

In § 723(1) of the New York Labor Law, the state legislature has set out specific characteristics which it considers constitutes a violation of the fiduciary duty of an officer or agent of a labor organization. The plaintiff alleges that this section conflicts with the federal sections governing the election and qualifications of union officials and is pre-empted thereby.

This court holds otherwise. Both the federal law and the state law impose fiduciary obligations on officers and agents of labor organizations. 29 U.S.C. 501(a); N.Y.L.L. § 723(1)(a) and § 723(1)(b). Moreover, both set forth sanctions available for use in the event of a breach of such fiduciary obligations. 29 U.S.C. § 501(b); N.Y.L.L. § 725(4). However, the mere identity of purpose between federal and state statutes does not result in the automatic invalidity of the state measures. *California* v. *Zook,* 336 U.S. 725 (1949); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U.S. 714 (1963). On the contrary, the history of the United States from the very creation of the Federal Government and the practical operation of federalism, favor the survival of the reserved authority of the state over matters that are the intimate concern of the state, unless Congress has clearly withdrawn all authority or the state's claim is in unmistakable conflict with what Congress ordered. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767 (1947); *DeVean* v. *Braistead,* 363 U.S. 144 (1960).

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[5] Swift v. Wickham, 382 U.S. 111 (1965).

Section 603 of the Federal Labor Management Reporting and Disclosure Act [6] has been described by the Supreme Court as "... an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials except where such pre-emption is expressly provided in the 1959 Act." 29 U.S.C. § 523(a); DeVean v. Braisted, *supra*.[7]

Since there is no conflict between 29 U.S.C. § 501(a) and New York Labor Law § 723 and since there is no express pre-emption clause in 29 U.S.C. § 501, this court holds that the federal statute regulating the fiduciary obligations of officers of a labor organization has not pre-empted the state statute.

Thus, the statute of which the plaintiff complains stands as a valid statute governing the fiduciary obligations of officers of labor organizations. The plaintiff, however, alleges that this section conflicts with the federal statutes governing the election of union officials. This is not so. The state statute does not prevent a man from campaigning for office, nor from being elected. It merely sets down the fiduciary obligations of an officer after he has been elected, which, as we have seen above, is a field which belongs to the state and has not been pre-empted by the Federal Government. Thus, the statute becomes effective only after the election, at which time, if he possesses the characteristics which violate this statute, he must divest himself of either the office or the conflicting characteristics.

This court holds, therefore, that § 723 of the New York Labor Law is neither in conflict with, nor pre-empted by

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[6] 29 U.S.C. § 523(a) provides in pertinent part that: "Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer . . . of a labor organization . . . under any other Federal law or under the laws of any State. . . ."

[7] See also: Bell v. Waterfront Commission, 183 F. Supp. 175 (S.D.N.Y. 1960), aff'd 279 F. 2d 853 (2d Cir. 1960).

the Federal Labor Management Reporting and Disclosure Act.

This leads the court to the second issue raised by the plaintiff, i.e., whether New York Labor Law § 723, insofar as it disables employes *per se* from holding union office, is unconstitutional as constituting a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution.[8]

A Bill of Attainder has been best described as a "trial by legislature". *U.S.* v. *Brown*, 381 U.S. 437, 442. The Supreme Court has struck down, as Bills of Attainder, statutes which inflicted punishment on a specific group without trial. *Cummings* v. *Missouri*, 4 Wall 277, 71 U.S. 277; *Ex Parte Garland*, 4 Wall 333, 71 U.S. 333. It further struck down, as a Bill of Attainder, a legislative act which prohibited payment of further salary to three named federal employers. *U.S.* v. *Lovett*, 328 U.S. 303. Most recently it struck down, as a Bill of Attainder, a statute which inflicted punishment automatically on any labor union official who was concurrently a member of the Communist party and holding union office or who had been a member of the Communist party within five years prior to his election to union office. *United States* v. *Brown, supra.* However, the Supreme Court has upheld a statute which permits the removal of any officer, director or employee of a bank who is concurrently an officer, director or employee of an underwriting firm. *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947).

The guideline as to whether or not a legislative act constitutes a Bill of Attainder is "specificity". The legislative acts which were struck down as Bills of Attainder inflicted punishment on specific persons or specific groups

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[8] Art. I § 10 provides in pertinent part that: "No State shall . . . pass any Bill of Attainder".

of persons while the legislative acts which have been upheld contained merely general characteristics.

The plaintiff alleges that the legislature has provided for the fiduciary obligations of officers and agents of labor organizations in general terms in Section 722 of the New York Labor Law and that Section 723 of the New York Labor Law which lists "specific prohibited financial interests and transactions", is a Bill of Attainder because it tells the judiciary just who must be punished.

The statute which the plaintiff attacks as a bill of attainder states in pertient part the following: "§ 723 (1) . . . it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization: (a) To have, directly or indirectly, any financial interest in any business or transaction of either an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or an employer who is in the same industry as such an employer;

(b) To have, directly or indirectly, any financial interest in the business or transaction of any person who sells to, buys from or otherwise deals with (i) an employer whose employees his labor organization represents or seeks to represent for purposes of collective bargaining, or (ii) an employer organization which represents such employer, or (iii) an employer who is in the same industry as such employer. . . . "

It is evident that this section merely sets out general characteristics which the state legislature considered would present a temptation to any man. Just as in *Board of Governors* v. *Agnew, supra,* where the legislature, relying on its general knowledge of human psychology, concluded that the concurrent holding of the two designated positions, i.e., officer, director or employee of an underwriting firm and officer, director or employee of a bank, would present a temptation to any, so too the legislature, relying on that same knowledge, came to the same conclu-

sion as to the specific financial interest and transactions listed in § 723 of the New York Labor Law.[9]

This court finds that § 723(1)(a) and § 723(1)(b) do not condemn any specific man or group of men, but if it is a condemnation of anyone, it is a condemnation of mankind in general. United States v. Brown, *supra,* at 454. The court further finds that § 723(1)(a) and § 723(1)(b) of the New York Labor Law is not an "exercise of specification" as the plaintiff alleges, but rather contains general characteristics and establishes an objective standard of conduct which this court fully endorses.

It is therefore the holding of this court that § 723(1)(a) and § 723(1)(b) of the New York Labor Law do not constitute a Bill of Attainder.

The history of the section authorizing the empanelment of a three-judge court [10] has been one of constrictive construction and the most recent Supreme Court decision on this issue [11] has continued that tradition.[12] It is apparent therefore, that to have the necessary jurisdiction to require the empanelment of a three-judge court, the complaint must state a substantial claim depending directly upon a substantive provision of the United States Constitution. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965). The Supreme Court has held that the mere conflict between a state and federal law is not, in itself, a sufficient ground upon which to empanel a three-judge court. Swift & Co. v. Wickham, *supra.*

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[9] It is important to note here that not only have the courts held, but in the opinion of this court, logic itself dictates that such restrictions as are here in question are not unreasonable.

[10] 28 U.S.C. § 2281.

[11] *Swift & Co.* v. *Wickham*, 328 U.S. 111.

[12] It is interesting to note that one of the basic considerations of the Supreme Court in returning to and continuing this tradition of constrictive construction was its concern for the efficient operation of the lower federal courts. Id. at 128.

A claim is plainly insubstantial within the meaning of the above holding, if it either obviously lacks merit or if its unsoundness has been clearly demonstrated by prior decisions of the Supreme Court. *Ex Parte Poresky*, 290 U.S. 30 (1933).

This court, having found the plaintiff's constitutional claim to be insubstantiated under the above criteria, denies the plaintiff's motion for a three-judge court.

Summary judgment is granted for the defendant.

So ordered.

Dated: New York, N. Y.
February 20, 1967.

JOHN M. CANNELLA
U. S. D. J.